FILED

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No. ——

OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

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WILLIAM G. McELROY,
*Petitioner*

v.

UNITED STATES OF AMERICA,
*Respondent*

AND OTHER CASES

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces**

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## SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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JAY LINDSEY COHEN
Colonel, United States Air Force
Chief, Appellate Defense Division
*Counsel of Record*

ERIC N. EKLUND
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Appellate Defense Counsel
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January 1995

16

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

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UNITED STATES

v.

SERGEANT ANTHONY P. DUCHINSKY, FR121-64-5715
UNITED STATES AIR FORCE

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ACM S28589
31 March 1993

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Sentence adjudged 15 August 1991 by SPCM convened at Andersen Air Force Base, Guam. Military Judge: Michael A. Kilroy.

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Jeffrey R. Owens, Captain David D. Jividen, and Captain Michael C. Barrett.

Appellate Counsel for the United States: Lieutenant Colonel Brenda J. Hollis, Major Paul H. Blackwell, Jr., Major John H. Kongable, and Captain Thomas E. Wand.

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Before

O'HAIR, SNYDER, and GRUNICK
Appellate Military Judges

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PER CURIAM:

We have examined the record of trial, the assignment of errors, and the government's reply thereto and have concluded that the findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantial rights of the accused was committed. *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982); *United States v. Longhi*, —— M.J. ——, ACM S28621 (A.F.C.M.R. 5 March 1993). Accordingly, the findings of guilty and the sentence are

AFFIRMED.

OFFICIAL

NANCY J. EUELL
Documents Examiner
Court of Military Review

SA-3

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

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UNITED STATES

v.

Senior Airman JOSEPH B. OWENS, FR216-11-0315
UNITED STATES AIR FORCE

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ACM 29751

24 June 1993

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Sentence adjudged 21 November 1991 by GCM convened at Hahn Air Base, Federal Republic of Germany. Military Judge: Michael B. McShane.

Approved sentence: Bad-conduct discharge, confinement for 12 months, forfeiture of $200 pay per month for 5 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Jeffrey R. Owens, Major Alice M. Kottmyer, and Major Marc A. Fox.

Appellate Counsel for the United States: Lieutenant Colonel Brenda J. Hollis, Major Paul H. Blackwell, Jr., and Captain James C. Sinwell.

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SA-4

Before

O'HAIR, SNYDER, and GRUNICK
Appellate Military Judges

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PER CURIAM:

Pursuant to pleas of guilty, appellant stands convicted of extortion and conspiracy, violations of Articles 127 and 81, UCMJ. We find no error and affirm.

Appellant complains the sentence was inappropriately severe. The maximum sentence authorized in this case was a dishonorable discharge, 6 years confinement, total forfeitures, and reduction to E-1. The sentence adjudged at trial was a bad-conduct discharge, 12 months confinement, forfeitures of $200 pay per month for 5 months, and reduction to E-1.

Appellant and his spouse engaged in conspiracy to take compromising photographs of Captain T naked with appellant's wife. After appellant obtained accusatory photos of Captain T, he threatened to disclose them to Captain T's wife and commander unless he received $500. Captain T reported the extortion attempt to investigators and appellant was apprehended following the extortion payoff.

According to appellant, prior to the incidents leading to this court-martial, his wife had affairs with another airman and Captain T. He asserts these court offenses were committed in response to his wife's provocation and in revenge for betrayal by Captain T, who had been providing marriage counseling to appellant and his wife. The evidence also indicates appellant was upset over a recent Article 15 punishment he had received for assaulting his wife, precipitated by her activity with Captain T. In its context, we do not find the sentence unreasonably severe. *United States v. Healy,* 26 M.J. 394 (C.M.A. 1988).

Appellant also contends the military judge erred when he instructed the court members on the effects of a punitive discharge. We find no prejudicial error in the military judge's use of the term "vested" during his sentencing instructions. *United States v. Longhi,* 36 M.J. 988 (A.F.C.M.R. 1993).

The findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantial rights of the appellant was committed. Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

NAOMI D. ALLEN
Technical Sergeant, USAF
Chief Court Administrator, AFCMR

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

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UNITED STATES

v.

SERGEANT TRAVIS J. MARTZ, FR569-41-0754
UNITED STATES AIR FORCE

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ACM 29719(F rev)

17 May 1994

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Sentence adjudged 10 December 1991 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Kevin L. Daugherty.

Approved sentence: Bad-conduct discharge, confinement for 3 months, forfeiture of $500 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for Appellant: Major Marilyn A. Gordon, Major Alice M. Kottmyer, and Major Marc A. Fox.

Appellate Counsel for the United States: Colonel Richard L. Purdon, Colonel Jeffery T. Infelise, Lieutenant Colonel Robert E. Williams, Jr., Major Paul H. Blackwell, Jr., and Captain Thomas E. Wand.

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Before

HEIMBURG, PEARSON, and SCHREIER
Appellate Military Judges

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PER CURIAM:

We have examined the record of trial, the assignment of errors, and the government's reply thereto and have concluded that the findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantial rights of the appellant was committed. *See United States v. Longhi,* 36 M.J. 988 (A.F.C.M.R. 1993); *United States v. Hansen,* 36 M.J. 599, 612 (A.F.C.M.R. 1992), *pet denied,* 38 M.J. 229 (C.M.A. 1993). Accordingly, the findings of guilty and the sentence are

AFFIRMED.

OFFICIAL

NANCY J. EUELL
Documents Examiner
Court of Military Review

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

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UNITED STATES

v.

Captain MICHAEL F. HEBERT, 014-48-0163
UNITED STATES AIR FORCE

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ACM 29622

14 September 1993

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Sentence adjudged 27 August 1991 by GCM convened at Andrews Air Force Base, Maryland. Military Judge: Richard T. Stansell-Gamm.

Approved sentence: Dismissal and confinement for 3 months.

Appellate Counsel for the Appellant: Colonel Jeffrey R. Owens, Colonel Terry J. Woodhouse, Major Marilyn A. Gordon, Major Alice M. Kottmyer, Major George F. May, and Major Mary C. Yastishock.

Appellate Counsel for the United States: Colonel Richard L. Purdon, Colonel Jeffery T. Infelise, Captain Thomas E. Wand, Captain Jules D. Silberberg, and Captain Jane M. E. Peterson.

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Before

SNYDER, RAICHLE, and JAMES
Appellate Military Judges

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## OPINION OF THE COURT

SNYDER, Senior Judge:

Pursuant to his negotiated, conditional pleas, Captain Hebert was convicted by general court-martial of conduct unbecoming an officer and gentleman, adultery, and committing an indecent act with another, in violation of Articles 133 and 134, UCMJ, 10 U.S.C. §§ 933, 934 (1988). The adjudged sentence of dismissal and confinement for 3 months was approved by the convening authority. Captain Hebert raises six assignments of error for our consideration, none of which have merit, and we affirm.

### I. SELECTIVE PROSECUTION

As mentioned, appellant was allowed to enter conditional pleas of guilty. *See* R.C.M. 910(a)(2).[1] Therefore, all issues raised by him at trial are preserved for review. His first assignment of error is that he was the victim of selective prosecution. After hearing evidence and entering findings, the military judge denied the motion.

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[1] The military judge approved the conditional pleas without making findings regarding the criteria for accepting conditional pleas as reflected in MCM, App. 21 at A21-52 (1984), which incorporates the criteria of Fed. R. Crim. P. 11(a)(2). We remind military judges to analyze the issue(s) an accused seeks to preserve via a condiitonal plea and make essential findings as to whether the issue(s), in fact, will be case dispositive. If not case dispositive, it is within the military judge's discretion to disapprove the conditional plea.

All of the offenses for which appellant was tried occurred in Bicester, England, where his unit was deployed during Operations Desert Shield/Storm. Appellant averred in support of his motion that conduct such as his was the norm in a deployment environment, and there was tacit acceptance of it as indicated by other instances of adulterous conduct known by him which went unpunished. However, appellant did not present any evidence of a similarly situated person within *his* command being treated differently than him. The argument most vigorously asserted by appellant at trial is that his two enlisted paramours received administrative reprimands rather than nonjudicial punishment [2] or trial by court-martial.

The test for whether one is the victim of selective prosecution is now well settled. An accused:

> [B]ears the heavy burden of establishing, at least *prima facie,* (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charges against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

*United States v. Hagen,* 25 M.J. 78, 83 (C.M.A. 1987), *cert. denied,* 484 U.S. 1060 (1988). Appellant failed in meeting his burden on both prongs of the *Hagen* test. First, he presented no evidence of his command treating similarly situated officers differently. Appellant's comparison of his plight with his enlisted paramours' was futile, for status as an officer may properly be considered when selecting disciplinary action. *United States v. Means,* 10

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[2] *See* Article 15, UCMJ, 10 U.S.C. § 815 (1988).

M.J. 162 (C.M.A. 1981). In an effort to meet the second prong of the *Hagen test,* appellant argued he was tried by court-martial solely because he exercised his right to silence when questioned by investigators. Again, he pointed to the corrective action taken against his enlisted paramours as support for his assertion. Appellant's commander, Brigadier General P, however, testified he was not even aware appellant had exercised his right to silence and, in any event, it would have played no part in his decision to prefer charges against appellant. General P testified he opted to prefer charges against appellant because officers must meet higher standards of conduct than enlisted personnel.

Appellant's commander did not use an impermissible standard in deciding to prefer charges against him. *Means,* 10 M.J. at 165. The military judge properly found there was no evidence of selective prosecution.

## II. SUFFICIENCY OF SPECIFICATIONS

Appellant also attacked specifications 2 and 3 of Charge I for failure to state an offense. Specification 2 alleges appellant did:

> [O]rally communicate to Airman First Class [D], an enlisted person then in his direct chain of command, certain indecent language, to wit: that Airman First Class [L] "had a nice ass" and that he "was going to get her" and that Airman First Class [S] "had a great body" and that he "wanted her."

With the exception of alleging a different airman to whom the language was communicated, specification 3 alleges identical misconduct, including a comment by appellant that he had sex with Airman S. Before this Court, appellant renews his argument that his comments to Airman D were no more than "bar talk" between men made while he

and Airman D were drinking together.[3] Appellant also argues the language is not indecent, and therefore, the specification fails to state an offense. We disagree.

A specification must apprise an accused of the offense he must be prepared to defend against and also protect against a future prosecution for the same or similar offense. A specification must allege all elements either specifically or by fair implication. *United States v. Schwartz,* 15 M.J. 109 (C.M.A. 1983); *United States v. Sell,* 3 U.S.C.M.A. 202, 11 C.MR 202 (1953) In view of appellant having contested specifications 2 and 3's sufficiency at trial, he is entitled to have them tested in a more critical light than those attacked for the first time on appeal. *United States v. French,* 31 M.J. 57 (C.M.A. 1990). Further, we must test the specifications' sufficiency by the allegations within each specification's four corners. *See French,* 31 M.J. at 59.

Conduct need not constittue a violation of another specific article of the UCMJ to violate Article 133 as long as a service member is on notice of the proscribed conduct, either via custom of the service or otherwise. *Parker v. Levy,* 417 U.S. 733 (1974); *accord United States v. Tedders,* 24 M.J. 176 (1987); *United States v. Boyette,* —— M.J. —— (A.F.C.M.R. 1993) (*en banc*). Accordingly, whether the comments appellant allegedly made are, in fact, indecent is not the determining factor regarding the specifications' sufficiency. It is whether the comments and the circumstances under which they were made could constitute conduct unbecoming an officer. *United States v. Novell,* 26 M.J. 477 (C.M.A. 1988).

The specifications in question clearly placed appellant on notice that he was accused of inappropriate conduct

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[3] The evidence at trial reflected that, in addition to planned evenings of drinking with Airman D, appellant habitually frequented a local pub where he drank and socialized with the enlisted personnel under his supervision.

with regards to his relationship with enlisted personnel under his command, including the use of inappropriate language. Further, while litigating the motion at trial, the prosecution informed the military judge and appellant that the Government was not relying on the indecency of the language as the gravamen of the offense, but the impropriety of appellant's conduct with, and comments to, Airman D. Moreover, appellant gave no indication at trial that he was not on notice his conduct could subject him to disciplinary action. *See Tedders,* 24 M.J. at 181. Although he claimed surprise that his conduct had in fact demeaned him in the eyes of his subordinates, he acknowledged awareness that his conduct was prohibited. After being advised of the definition of indecent language, appellant also admitted at trial that his comments could tend to cause lustful thoughts in Airman D. Language which incites lustful thoughts may be deemed indecent. MCM, Part I, paragraph 89(c) (1984).[4]

The stipulation of fact and appellant's responses during the providency inquiry convince us he knew his conduct was inappropriate for an officer and proscribed by Article 133. Accordingly, we find specifications 2 and 3 of Charge I sufficiently stated an offense to which appellant providently pleaded guilty. *French,* 31 M.J. 57; *Tedder,* 24 M.J. 176; *see also United States v. Cisler,* 33 M.J. 503 (A.F.C.M.R. 1991).

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[4] Although the prosecution asserted the Government was not relying on indecency of the language as the gravamen of the offenses, trial counsel nonetheless recommended the punishment for communicating indecent language be used as the maximum punishment for specifications 2 and 3 of Charge I because indecent language was the most analogous offense. The military judge agreed. As a result, appellant was exposed to one-half the punishment to which he would have been exposed for an Article 133 or 134 fraternization offense. *See* MCM, Part IV, paragraphs 59(e) and 83(e) (1984).

Appellant also attacked the sufficiency of specification 2 of Charge II, which alleged the commission of an indecent act with another. The specific indecent act alleged was appellant and Airman L engaging in sexual intercourse in the presence of appellant's roommate, Major R, who was present in the room at the time and heard appellant's and L's act of sexual intercourse. Relying on *United States v. Jackson,* 30 M.J. 1203 (A.F.C.M.R. 1990), appellant argues that, because neither he nor L touched Major R, the specification fails on its face with regards to committing an indecent act. We disagree.

Fornication in the presence of others, or under conditions where discovery by others is likely, is actionable as an indecent act. A specification alleging such conduct states an offense under Article 134, UCMJ. *United States v. Berry,* 6 U.S.C.M.A. 609, 20 C.M.R. 325 (1956); *United States v. Blake,* 33 M.J. 923 (A.C.M.R. 1991); *see also United States v. Scoby,* 5 M.J. 160 (C.M.A. 1978). In addition to appellant's reliance on Jackson being extremely misplaced, his assertion is also contrary to the long line of precedents cited *ante.* We discern no reason to rule contrary to those precedents.

## III. OTHER ISSUES

The military judge properly ruled specification 1 of Charge I (fraternization with Airman L) was not multiplicious for findings with specification 1 of Charge II (adultery). Including the words, "not his wife" in the pleading of specification 1 of Charge I did not implead the adultery offense as an included offense thereof. The current test for multiplicity is whether two offenses contain the same elements. If either offense requires an element not present in the other, the offenses are not multiplicious. *United States v. Teter,* —— M.J. —— (C.M.A. 1993). Applying *Teter,* we find the offenses separate for findings purposes. Further, the military judge instructed the members the offenses were multiplicious for sentenc-

ing. Therefore, appellant was not prejudiced even if the ruling was error.

The issue regarding the military judge's instruction on the impact of a punitive separation on veterans' benefits has been resolved adversely to appellant. *United States v. Longi*, 36 M.J. 988 (A.F.C.M.R. 1993); *United States v. Hansen*, 36 M.J. 599 (A.F.C.M.R. 1992).

## IV. SENTENCE SEVERITY

Appellant also avers his sentence is inappropriately severe. We have given individualized consideration to appellant, including the nature and seriousness of the offenses and the character of appellant's service. We do not find the sentence inappropriately severe. *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982); Article 66(c), UCMJ.

The findings and sentence are correct in law and fact, Article 66(c), UCMJ, and, on the basis of the entire record, are hereby

AFFIRMED.

Senior Judges RAICHLE and JAMES concur.

OFFICIAL

NAOMI D. ALLEN
Technical Sergeant, USAF
Chief Court Administrator, AFCMR

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